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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOSEPH LOMBARDO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Whether the rulings of *McNally v. United States* and *Stromberg v. United States* compel reversal of petitioner's wire fraud charges and dismissal of the underlying indictment.

PARTIES TO THE PROCEEDINGS BELOW

In the proceedings below, *United States v. Lombardo, et al.*, Nos. 88-1482 and 88-1522 (7th Cir. 1989), United States of America was appellee, and Joseph Lombardo and Roy Williams were appellants. Lombardo is petitioner herein.

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In The

Supreme Court of the United States

October Term, 1988

JOSEPH LOMBARDO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Joseph Lombardo prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, denying his appeal from the denial of Motion to Vacate Conviction and Dismiss Indictment pursuant to 28 U.S.C. § 2255.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, consolidated Nos. 88-1482 and 88-1522, filed January 12, 1989, is not yet reported and is

set out as Appendix A. The judgment of the United States District Court, filed February 18, 1988, is set out as Appendix B. The mandate of the United States Court of Appeals issued on February 3, 1989 is set out as Appendix C.

JURISDICTIONAL STATEMENT

On February 3, 1989, mandate issued upon the January 12, 1989 opinion of the Court of Appeals for the Seventh Circuit (App. C). There was no petition for rehearing filed. This petition is timely filed within 60 days thereof. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Court Rule 20.1.

Jurisdiction was lodged in the trial court under 18 U.S.C., section 3231, giving jurisdiction for offenses against the United States, the charges against petition being such offenses.

STATUTE INVOLVED

18 U.S.C., Section 1343

Section 1343. Fraud by wire, radio or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations or promises, transmits or causes to be transmitted by means of wire, radio, or television communica-

tion in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1000 or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

Nature Of The Case

Petitioner Joseph Lombardo and others were indicted under 18 U.S.C. sections 1343, 1952 and 371. All were charged with conspiracy at count 1, traveling interstate with the intent to promote bribery at count 2, and at counts 3-11, with wire fraud.

Following conviction petitioner appealed and his conviction was affirmed by the Seventh Circuit Court of Appeals (*United States v. Williams, et al.*, 737 F.2d 594 [7th Cir. 1984, *cert. den.* 470 U.S. 1003]).

Thereafter, relying upon the 1987 opinion of this Court in *McNally v. United States*, 107 S.Ct. 2875, petitioner moved the trial court, pursuant to 28 U.S.C. section 2255, for vacature of conviction and dismissal of the underlying indictment. The trial court denied the petition (App. B), and the Seventh Circuit Court of Appeals affirmed the denial (App. A).

REASONS FOR GRANTING THE WRIT

THE UNDERLYING INDICTMENT IS FATALLY DEFECTIVE UNDER *McNALLY v. UNITED STATES*, AND THE RULE OF *McNALLY*, INVALIDATING THE "INTANGIBLE RIGHTS" THEORY OF CRIMINAL LIABILITY REQUIRES REVERSAL OF CONVICTION UNDER *STROMBERG v. UNITED STATES* BECAUSE THE CHARGE, THE PROOFS AND THE INSTRUCTIONS TO THE JURY PERMITTED CONVICTION UPON A NOW DISCREDITED THEORY OF CRIMINAL LIABILITY.

This writ ought to be granted upon two distinct, but interrelated grounds: (1) the ruling of this Court in *McNally v. United States*, 107 S.Ct. 2875 (1987) renders the underlying indictment here fatally defective in that it charges at Counts Three through Eleven (all of which are incorporated into Count One) a scheme and artifice to defraud of "intangible rights" now prohibited as the premise of criminal liability; and (2) a post-*McNally* review reveals that the charge, the proofs at trial, and most especially the overwhelming emphasis of the trial court's instructions to the jury permitted conviction upon the now discredited "intangible rights" theory in violation of the rule of *Stromberg v. United States*, 283 U.S. 359, 51 S.Ct. 532 (1931).

The Indictment And *McNally*

Before *McNally*, there was an evident consensus among the government, the trial court and the Seventh Circuit Court of Appeals that the indictment charged, notwithstanding a brief ritualistic litany of the conjunctive statutory language, a scheme to defraud the Fund of the loyal services of its trustees. The scheme is set forth at Count 3 as follows (App. D):

"3. It was part of the scheme and artifice to defraud that defendants and William Webbe would and did attempt to obtain an exclusive right to purchase the Wonderworld Property at a specified price for Senator Howard W. Cannon and individuals associated with him.

4. It was further a part of the scheme and artifice that defendants and William Webbe would and did cause individuals and entities not associated with Senator . . . Cannon to withdraw bids made to Palmieri Company to purchase the Wonderworld Property.

5. It was further part of the scheme and artifice that defendants would and did fail to disclose to Palmieri Company, agent of the Teamsters Pension Fund, the activities of defendants THOMAS F. O'MALLEY and ANDREW G. MASSA in causing the withdrawal of bids on the Wonderworld Property, which bids were higher than and in competition with the bids of Senator . . . Cannon and persons associated with him.

6. It was further part of the scheme and artifice that defendants would and did conceal from Palmieri Company ALLEN M. DORFMAN's participation in the proposed purchase of the Wonderworld Property."

The only mention in Count Three's detailed description of the scheme charged of any loss either intended by the schemers or naturally consequent upon the scheme is placed exclusively in the context of the loyal services scheme, and its intended failure of the trustees to disclose the existence of higher bids (paragraph 5). It charges, *not* a scheme to obtain money or property from the Fund by a false or fraudulent representation, but purely a scheme to withhold that which loyal services would require the trustees to disclose to the Fund manager.

The trial court, accurately perceiving the gravamen of the indictment, devoted the overwhelming time and emphasis of its charge to the jury (more than an hour in duration) to describing, delineating, detailing and defining the elements of a scheme to defraud of loyal services. Its only mention of the conjunctive language of the indictment came in a brief, boilerplate instruction saying, in effect, if the jury found the charges set forth in the indictment proven it should convict, and the converse upon a determination they were not proven.

At initial appeal, this petitioner complained that the disjunctive nature of the instructions permitted conviction upon a less than unanimous judgment of the jury (737 F.2d 613). The instruction complained of stated:

> "[A] scheme to deprive the Central States Pension Fund and its agent Victor Palmieri of information material to a decision which Victor Palmieri Company was required to make as a fiduciary and exclusive management agent of the Pension Fund also comes within the meaning of a 'scheme or artifice to defraud. . .' "

The Seventh Circuit, in consensus with the trial court's view of the case, and rejecting this complaint which closely foreshadowed the *McNally* issue, noted that the common tool to guarantee an unanimous verdict is an indictment that charges only one offense in a single count. At page 614 the court rejected petitioner's challenge, holding as follows:

> "In the instant case, the indictment (Counts III to XI) did charge only one offense per count—one scheme to defraud the Pension Fund of the loyal services of O'Malley [citation omitted]. From the point of view of the charges, therefore, we cannot conclude that the court's general instruction on unanimity was deficient."

No cry of the court's mistaken reading of its indictment was heard to emanate from the government in response to this ruling.

After *McNally*, consensus yielded to disparate and revisionist views of the charges and instructions which had, of course, remained unchanged. After *McNally*, the trial court in rejecting the section 2255 petition, determined that the loyal services issue which had consumed most of its charge to the jury was, at last, "mere surplusage." (App. B).

The consensus shattered, leaving the trial court now describing as mere surplusage that which the Appellate Court had ruled was the *only* charge of the indictment, the government disputed both courts at appeal, insisting that instead it was but one of two essential elements upon both of which the jury must necessarily have reached an unanimous judgment.

Unarguably, *McNally* precludes wire fraud conviction upon a scheme to defraud of loyal services. The ruling of the court below that the indictment it read to contain that charge alone in 1984, and reads now to contain a still-viable charge it failed to see then, describing the only charge discernible to it in 1984 as mere surplusage in 1989, brings the court below into conflict with itself.

Moreover, its revised reading of the indictment is also in conflict with other circuits engaged in similar post-*McNally* analysis of indictments brought when loyal services schemes could still serve to support convictions.

Thus, in *United States v. Price*, 857 F.2d 234 (1988), the court reviewed, post-*McNally*, an indictment which charged union officials with a scheme to defraud the union of their loyal services. It is noteworthy that the *Price* scheme actually entailed the schemers procuring money by charg-

ing members excess dues and fees which they then pocketed. Clearly, the money or property aspect of the loyal services scheme was at least implicit in the charge, personal gain was at the heart of the scheme.

In contrast in the instant case, no schemer intended to reap any benefit from the scheme charged. The scheme charged contemplated, in what was ultimately determined by the conspiracy conviction to be an *ultra-vires* act of various union officials, the swap of union-owned property in return for union-desired official action upon pending legislation in which it had a substantial interest. No schemer sought to obtain money or property from the union for his own benefit. At most, the scheme might have contemplated, or resulted in, a reduced profit on its property in return for something it perceived to have far greater monetary value.

Notwithstanding the money and property overtones, the *Price* Court reversed the convictions and dismissed the underlying indictment for its failure to adequately charge a scheme still viable after *McNally*. Finding it unclear that from the essential paragraphs of the indictment the grand jury found probable cause to charge the defendants with a scheme to defraud of property or property rights, the indictment was ruled insufficient.

The fatal defects of the instant indictment are no less clear here. Count Three charges, just as the Seventh Circuit said in 1984, a single scheme to defraud the Fund of the loyal services of its trustee.

McNally cannot be averted by a willingness to transform that which was clear in 1984 into something wholly different in 1989. It can only serve, in fair review of this indictment under the *McNally* standard, to compel reversal and dismissal of the indictment.

Worthy of note in the *Price* ruling is that upon an initial pre-*McNally* appellate challenge to the loyal services charges, the Fourth Circuit Court of Appeals relied heavily upon its earlier ruling in *United States v. Mandel*, 591 F.2d 1347, 1361 (4th Cir. 1979) for its rejection of the challenge to the loyal services scheme as being without the intended purview of the mail fraud statute.

Of course, in the wake of *McNally* the *Mandel* conviction was reversed, and his indictment, too, was dismissed as insufficient to support a mail fraud conviction not violative of *McNally*. The *Mandel* indictment virtually mirrors that in the instant case, 862 F.2d 1067 (4th Cir. 1988).

The court below is similarly in conflict with the Third Circuit Court of Appeals. There, in *United States v. Zauber, et al.*, 857 F.2d 137 (1988), once again union officials were charged with violations of their fiduciary duties as well as with receipt of money in the nature of kickbacks flowing from a scheme involving the imprudent investment of the union's pension funds, reaping a resultant lesser profit that would otherwise have been realized.

The *Zauber* mail fraud charge contained the statute-tracking conjunctive language as it does in the instant case. But, as here, the count setting forth the details of the scheme charged, while clearly indicating the intent to pocket monies not their own, did not charge a post-*McNally* viable scheme to defraud the union of money or property.

In sharp contrast to the Seventh Circuit's revision of its own pre-*McNally* reading of the indictment, the *Zauber* Court ruled at page 147 as follows:

> "In construing an indictment, we will not strain to interpret a defective indictment as implicitly alleg-

> ing that a kickback scheme's purpose was to deprive the pension fund beneficiaries of money."

(Accord, *United States v. Davis*, 841 F.2d 1127 [6th Cir. 1988]).

In reaching to the point of outright rejection of an earlier and unequivocally stated ruling, the strain of the court below is palpable.

The Seventh Circuit Court of Appeals, in denying the section 2255 petition, was called upon to deny its own rulings, and it did. In doing so, it finds itself in conflict with sister circuits. That such conflict should arise in the wake of a ruling of this Court possessed of the scope and impact of *McNally* is not unusual. The conflicts are inevitable, and their resolution is mandated.

Given the circumstances under which the instant ruling arises, *i.e.* from a court in conflict with others and itself, petitioner's petition presents a particularly compelling need for resolution to this Court.

The Indictment, The Instructions and *Stromberg*

Recalling that the loyal services issue was once viewed by the court below as the only charge of the wire fraud counts, and later viewed by it and the trial court as mere surplusage to a heretofore undetected charge that operates to survive *McNally*, the issue of whether the jury verdict must be reversed arises under this Court's ruling in *Stromberg v. United States*, 283 U.S. 359, 51 S.Ct. 532 (1931).

It is safe to say that the *Stromberg* rule is well settled American law, it having been reaffirmed numerous times over dozens of years. (*Williams v. North Carolina*, 173

U.S. 287, 63 S.Ct. 207, 87 L.Ed. 297 (1942); *Cramer v. United States*, 324 U.S. 1, 65 S.Ct. 918, 89 L.Ed. 1441 (1944); *Yates v. United States*, 348 U.S. 298, 17 S.Ct. 1064, 1 L.Ed.2d 1356 (1957); *Bachellar v. Maryland*, 397 U.S. 564, 90 S.Ct. 1312, 25 L.Ed.2d 570 (1970)). Every appellate circuit has long followed the rule and applied that standard of *Stromberg* in determination of challenge to verdicts in circumstances like those created by the *McNally* ruling, wherein all or part of the indictment contains later invalidated charges. *Stromberg* requires more than a ritualistic look to the indictment's language in its proper application, as occurred in the court below. There must be a determination that the indictment, the proofs at trial, and particularly, the trial court's instruction to the jury did not give rise to the possibility of a verdict wholly or partly premised upon a now discredited theory of criminal liability.

Until this case came before it, the Seventh Circuit Court of Appeals unfailingly adhered to and applied *Stromberg* to challenges such as these. (*United States v. Baranski*, 484 F.2d 556 [1973]; *United States v. Head*, 641 F.2d 174 [1981]; *Cramer v. Fahner*, 683 F.2d 1376 [1982]; *United States v. Feldman*, 711 F.2d 758 [1983]).

As recently as 1978, in *Head*, the Seventh Circuit expressly adopted the view of the Ninth Circuit in *United States v. Carman*, 577 F.2d 556-67 (1978), holding at page 179, 641 F.2d 174 as follows:

> "More significantly, we agree with the Ninth Circuit's view, expressed in *United States v. Carman* (citation omitted) that *Stromberg v. California* (citation omitted) compels an appellate court to reverse where a general verdict renders it impossible to say whether a defendant was convicted under an erroneous or valid view of the law. . . ."

So firm was the Seventh Circuit's commitment to the *Stromberg* rule, it applied it to reverse a civil verdict in *Saturday Evening Post Co. v. Rumbleseat Press, Inc.*, 816 F.2d 1191 (1987).

Had *Stromberg* been applied in the court below, consistent with an unbroken historic line of authority requiring its application here, petitioner's conviction could not have been found to be sustainable.

Here, not only is a revisionist view of the indictment required to sustain the wire fraud conviction, but the overwhelming emphasis of the proofs at trial, and more importantly, the trial court's charge to the jury must be wholly overlooked. Indeed, in the court below they were.

The trial court charged the jury for more than one hour. In charging upon the wire fraud counts, it variously charged in the conjunctive and disjunctive. Thus, the jury was told:

> "The phrase 'scheme and artifice to defraud' as used in the indictment or these instructions includes any plan or course of action intended to deceive others out of something to which they were lawfully entitled, and to obtain by false or fraudulent pretenses or representations money or property from persons so deceived." (Tr. 7959, App. E)

But they were also told:

> "A scheme to deprive the Central States Pension Fund and/or its pensioners of the conscientious, loyal, faithful, disinterested and unbiased services of the defendant O'Malley comes within the meaning of the term 'scheme and artifice to defraud' as the term is used in the indictment and these instructions.
>
> Similarly, a scheme to deprive the Central States Pension Fund and its agent Victor Palmieri Company of information material to a decision which Victor Pal-

mieri Company was required to make as a fiduciary and exclusive management agent of the Pension Fund also comes within the meaning of a 'scheme or artifice to defraud.'

However, a defendant must have knowingly interfered with an employer-employee relationship or caused the breach of a fiduciary relationship for the purpose and with the intent of depriving the Central States Pension Fund and its participants of the honest and faithful performance of the duties which defendant O'Malley owed the Central States Pension Fund.

Therefore, it is for you to decide whether the Government has proved beyond a reasonable doubt that Mr. O'Malley failed to disclose any facts to the Pension Fund and Victor Palmieri Company, and, if so, whether the facts were material. And if you find that he did fail to disclose material facts, whether the other defendants knew and intended that he would fail to disclose those facts.

The Defendant O'Malley as a trustee of the Central States Pension Fund had a duty to disclose and not to conceal facts known to him which he had reason to believe were material to the decisions of the Central States Pension Fund and his agent Victor Palmieri concerning the management and sale of real estate assets of the Central States Pension Fund.

The fact that Defendant O'Malley did not have responsibility for the management and sale of Central States Pension Fund real estate assets does not change his duty of disclosure.

In determining whether the defendants defrauded the Central States Pension Fund and those covered by its benefits of their right to the conscientious, loyal, faithful, disinterested and unbiased services of Defendant O'Malley, you may consider the following statements of law which serve to define the standards

of conduct expected of employees generally and of a pension fund trustee particularly: . . ." (Tr. 7960-64, App. E)

The court also charged the jury:

"You have also heard evidence that under the management contract with Victor Palmieri and Company, the trustees of the Pension Fund retained the responsibility of monitoring Victor Palmieri and Company's compliance with its fiduciary obligation to the Pension Fund under the management contract and the applicable law.

You have heard evidence that during the period covered by the indictment, Mr. O'Malley engaged in certain conversations and conduct. You must determine from your consideration of all the evidence whether Mr. O'Malley engaged in those conversations and that conduct, and whether those conversations and that conduct breached Mr. O'Malley's fiduciary duty to the Pension Fund, or whether instead the conversations and conduct constituted acts within his responsibility of monitoring Victor Palmieri and Company's compliance with its fiduciary obligations under the management contract and the applicable (sic) [law] and, thus, fell within Mr. O'Malley's fiduciary obligations.

If from your consideration of all the evidence you have a reasonable doubt that Mr. O'Malley engaged in those conversations and that conduct, or that those conversations and that conduct breached Mr. O'Malley's fiduciary duty to the Pension Fund, then you must acquit all of the defendants of defrauding the Pension Fund and its pensioners of their right to the conscientious, loyal, faithful, disinterested and unbiased services of Mr. O'Malley as charged in Counts III through XI of the indictment.

In determining whether certain conduct breached Mr. O'Malley's fiduciary duty to the Pension Fund,

you must consider it against the standards defining his fiduciary duties, which I have given you with these instructions, and all the evidence in the case.

On the other hand, to sustain the charges alleged in Counts III through XI, you must find more than that Mr. O'Malley by engaging in certain conversations and conduct breached his fiduciary duty to the Pension Fund.

In addition, you must find beyond a reasonable doubt that Mr. O'Malley had an affirmative duty to disclose to the Pension Fund his conversations, and conduct, and that he either did not disclose the information to the Pension Fund or made misrepresentations regarding his conversations and conduct.

If from your consideration of all the evidence you have a reasonable doubt that Mr. O'Malley either had an affirmative duty to disclose to the Pension Fund his conversations and conduct, or, if he did have a duty of disclosure, that he failed to disclose them or he misrepresented the nature of his conversations and conduct, then you must acquit all of the defendants of defrauding the Pension Fund and the pensioners of their right to the conscientious, loyal, faithful, disinterested and unbiased services of Mr. O'Malley as charged in Counts II through XI of the indictment.

In determining whether Mr. O'Malley had a duty to disclose information about his conduct to the Pension Fund, you must consider all of the evidence, including evidence regarding Mr. O'Malley had reason to believe the information about his conduct would lead the Pension Fund to amend the conduct.

In this regard, you should consider evidence about the nature of Mr. O'Malley's fiduciary relationship with the Pension Fund, the rules of conduct applicable to Mr. O'Malley's position at the Pension Fund, and any instructions, if any, given to Mr. O'Malley concerning his duties at the Pension Fund." (Tr. 7982-7985, App. E)

The court further charged:

> "The success or failure of the scheme is immaterial, and it is not necessary to show that the Central States Pension Fund, Victor Palmieri and Company or any of its participants or beneficiaries were in fact defrauded." (Tr. 7960, App. E)

Concerning the alleged breach of Mr. O'Malley's fiduciary duty, the court instructed the jury as follows:

> "In determining whether certain conduct breached Mr. O'Malley's fiduciary duty to the Pension Fund, you must consider it against the standards defining his fiduciary duties, which I have given you with these instructions, and all the evidence in the case.
>
> On the other hand, to sustain the charges alleged in Counts II through XI, you must find more than that Mr. O'Malley by engaging in certain conversations and conduct breached his fiduciary duty to the Pension Fund.
>
> In addition, you must find beyond a reasonable doubt that Mr. O'Malley had an affirmative duty to disclose to the Pension Fund his conversations, and conduct, and that he either did not disclose the information to the Pension Fund or made misrepresentations regarding his conversations and conduct.
>
> If from your consideration of all the evidence you have a reasonable doubt that Mr. O'Malley either had an affirmative duty to disclose to the Pension Fund his conversations and conduct, or, if he did have a duty of disclosure, that he failed to disclose them or he misrepresented the nature of his conversations and conduct, then you must acquit all of the defendants of defrauding the Pension Fund and the pensioners of their right to the conscientious, loyal, faithful, disinterested and unbiased services of Mr. O'Malley as charged in Counts III through XI of the indictment.
>
> In determining whether Mr. O'Malley had a duty to disclose information about his conduct to the Pen-

> sion Fund, you must consider all of the evidence, including evidence regarding Mr. O'Malley had reason to believe the information about his conduct would lead the Pension Fund to amend the conduct.
>
> In this regard, you should consider evidence about the nature of Mr. O'Malley's fiduciary relationship with the Pension Fund, the rules of conduct applicable to Mr. O'Malley's position at the Pension Fund, and any instructions, if any, given to Mr. O'Malley concerning his duties at the Pension Fund." (Tr. 7984-7985, App. E)

In reviewing this case under the *Stromberg* standard to determine whether reversal of a jury verdict is compelled because it may have arisen from a partially invalid statute, it is noteworthy to recall: (1) the pre-*McNally* universal consensus that the charge was exclusively a loyal services scheme; (2) the post-*McNally* revision now finding the loyal services scheme to be mere surplusage; and (3) the fact that these initial convictions and subsequent transformations were reached by the most senior trial judge in the district, an appellate panel consisting of justices long presiding on the Seventh Circuit's bench, and government counsel who was the Chief of the Organized Crime Strike Force for the Justice Department.

The jurors, of course, were relative novices.

In its post-*McNally* review of the trial court's denial of the 2255 petition, notwithstanding the government's opposition to the new mere surplusage view of the trial court, the court below simply abandoned its original ruling, and the *Stromberg* standard. In so doing it again came into conflict with itself, as well as with this Court and all circuits which have for more than fifty years adhered to the *Stromberg* rule as a basic precept of the guarantee of our criminal justice system of fairness and due process of law.

Despite petitioner's direct challenge under *Stromberg*, and its obvious applicability to a review of the indictment, proofs and instructions at trial, the court below simply ignored the rule, omitting any mention of its standard of review in its ruling which was premised exclusively upon its revised reading of the indictment.

This avoidance of the *Stromberg* ruling where it was so clearly basic to a fair consideration of the issues raised in the petition, placed the court below in conflict with the rule, doing violence to its historic protections.

This aversion to and avoidance of the command of *Stromberg* in this case represents a radical departure from that which has been the rule of law in the Seventh Circuit for many years.

Petitioner, for whom this case was a first exposure to the criminal justice system, finds himself struggling to reconcile the irreconcilable in an effort to understand the disparate rulings of the court below. He first complained to it that the jury instructions, given in the disjunctive, permitted return of a verdict without requisite underlying unanimity as to the theory of liability. He was told that he was wrong, there was only one theory of liability charged—a loyal services fraud scheme.

Along came *McNally*, removing such a scheme from the purview of the statute under which he was convicted. He reasonably believed he saw the jail door opening. He filed his 2255 petition, drawing the court's attention to the invalidity of his conviction of what the court below described as a loyal services scheme and only a loyal services scheme. To his chagrin, the trial court, and the court below now said that this singular scheme had become, in post-*McNally* retrospect, mere surplusage to the real charge (which had apparently been so elusive it escaped

the trial court's instructions and the appellate court's scrutiny of the indictment).

As that door creaked closed again, it appeared for all the world to petitioner that he is serving a lengthy prison sentence for conviction of either a now discredited theory or for conviction of mere surplusage.

Neither is permissible.

McNally And The Other Counts

Count One charged a conspiracy to bribe a senator. In setting out its overt acts, count one specifically incorporates all the acts and charges set forth in Counts Three through Eleven as such overt acts.

Upon a determination under the rule of *McNally* and/or *Stromberg* that the wire fraud counts cannot stand, then Count One must fall as well. It is impossible to know if the jury convicted of conspiracy, relying upon the overt acts enumerated in the *McNally*-discredited wire fraud counts. Such a determination is particularly unavailable in view of the law providing, and the instructions charging, that conviction of the conspiracy charged does not require belief that all of the overt acts charged were committed, and reliance upon proof of any of them is sufficient to convict.

While Count Two, charging attempt bribery, does not specifically incorporate the wire fraud scheme, nevertheless it being part of all other counts in an indictment in which all counts are so closely interrelated that, it too must fall.

CONCLUSION

For the foregoing reasons petitioner Joseph Lombardo urges the court to issue its writ of certiorari to the end that the opinion of the court below be reversed.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 88-1482 and 88-1522

JOSEPH LOMBARDO and ROY L. WILLIAMS,

Petitioners-Appellants,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 81 CR 269—**Prentice H. Marshall,** *Judge.*

ARGUED OCTOBER 28, 1988—DECIDED JANUARY 12, 1989

Before BAUER, *Chief Judge*, CUMMINGS and CUDAHY, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* Defendants Joseph Lombardo and Roy L. Williams, together with three co-defendants, were each convicted in the United States District Court for the Northern District of Illinois of nine counts of wire fraud in violation of 18 U.S.C. § 1343, one count of conspiracy to bribe a United States Senator in violation of 18 U.S.C. § 371, and one count of traveling interstate with the intent to promote bribery in violation of 18 U.S.C. § 1952. Lombardo received an aggregate sentence of 15 years plus substantial fines. In addition to fines, Williams

received a ten-year prison term. This Court affirmed the convictions.[1]

Following the 1987 decision of the Supreme Court in *McNally v. United States*, 107 S. Ct. 2875, defendants returned to the district court to mount a collateral attack on the validity of their convictions pursuant to 28 U.S.C. § 2255. *McNally* reversed an accepted interpretation of mail fraud[2] by the courts in holding that the mail fraud statute contemplates only offenses designed to obtain property rights fraudulently in contrast to schemes depriving the victim of intangible rights. Both the defendants and the United States concede that *McNally* is to be applied retroactively since the defendants' convictions cannot stand if their conduct no longer constitutes criminal activity. *United States v. Keane*, 852 F.2d 199, 205 (7th Cir. 1988).

Judge Prentice Marshall was the trial judge. After reviewing the indictment, evidence and lengthy instructions given to the jury in their 1982 trial, he denied defendants' motions to vacate their convictions, as well as their motions to reconsider. The court found that the indictment and jury instructions alleged two objectives of the wire fraud scheme in the conjunctive, one involving property rights and the other involving the impermissible intangible rights theory. As a result, the jury was required to find a deprivation of property rights in order to convict

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[1] *United States v. Williams*, 737 F. 2d 594 (7th Cir. 1984), certiorari denied, 470 U.S. 1003. Subsequent to filing this appeal, defendant Williams was released from incarceration on parole. Both the United States and Williams have, however, stipulated that the release of Williams does not impact on the merits of this appeal given that Williams was in custody when the appeal was filed, thus satisfying the custody requirement of 28 U.S.C. § 2255. See *United States v. Payne*, 741 F. 2d 887, 890 (7th Cir. 1984).

[2] *McNally* applies with equal force to the wire fraud convictions since the scope of the wire fraud statute is for most purposes coextensive with that of the mail fraud statute. See *United States v. Gimbel*, 830 F. 2d 621, 627 (7th Cir. 1987).

the defendants, rendering the intangible rights language mere surplusage. We affirm.

I

Because the defendants are contesting their convictions, we must review all evidence in the light most favorable to the government. *United States v. Bentley*, 825 F.2d 1104, 1107 (7th Cir. 1987), certiorari denied, 108 S. Ct. 240. Defendants were convicted for their conduct surrounding the sale of a piece of property, known as Wonderworld, located in Las Vegas, Nevada, and owned by the Teamsters Central States Pension Fund ("Pension Fund"). At the time of the sale of the property, defendant Williams was the President of the Central Conference of Teamsters ("Teamsters") while defendant Lombardo's vocational status was "something of a mystery." 737 F.2d at 599. The Wonderworld property was located in close proximity to the residence of then United States Senator Howard Cannon. Senator Cannon, together with his neighbors, became interested in purchasing the Wonderworld property in order to prevent it from being used for commercial development.

During the transaction in question, legislation was pending in Congress which would lead to the deregulation of the trucking industry, a move strongly opposed by the Teamsters. As Chairman of the Senate Committee on Commerce, Senator Cannon was in a position to influence the future of the legislation. Since Senator Cannon and the Pension Fund each possessed something of value to the other party, the defendants participated in communications with the Senator for the objective of selling the Wonderworld property to him for $1,400,000 to the exclusion of higher bids, with the hope of influencing his position toward the deregulation legislation.

Defendants' ability to control the sale of the Wonderworld property was diluted by the necessity of delegating control over the assets of the Pension Fund to a management company, Victor Palmieri and Company, in order

for the Pension Fund to retain its tax-exempt status. As a result, in order to consummate the sale of the Wonderworld property to the Senator as promised, the defendants were forced to pursue a less direct method of influence by encouraging the withdrawal of other potentially higher bids for the property. At the behest of defendant Lombardo, Thomas O'Malley and Andrew Massa, Pension Fund trustees, persuaded Allen Glick to withdraw his $1,600,000 bid for the Wonderworld property. Glick in turn persuaded his business partner, Fred Glusman, to withdraw his independent bid of $1,600,000. In spite of the defendants' efforts, Wonderworld was eventually sold to a corporation unrelated to the defendants for $1,600,000.

II

In order to convict the defendants of wire fraud, two elements must be proven: (1) a scheme to defraud; and (2) use of wire communications in furtherance of the scheme.[3] Prior to *McNally*, courts had interpreted the mail fraud statute (28 U.S.C. § 1341), which criminalizes schemes "to defraud" or schemes to obtain "money or property by means of false or fraudulent pretenses . . .", in the disjunctive, enabling conviction for schemes to defraud which did not necessarily include the deprivation of property rights. See *McNally* at 2880. Accordingly, defendants' convictions in *McNally* were based on instructions charging the jury that the defrauding of the citizens of their intangible rights to honest and impartial government was

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[3] Section 1343, the wire fraud statute, provides in relevant part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire . . . for the purpose of executing such scheme or artifice, shall be fined . . . or imprisoned . . ."

This language tracks the earlier mail fraud statute, 28 U.S.C. § 1341, and therefore is to be given a like construction.

sufficient to constitute mail fraud without a finding that the victims of the fraud were deprived of anything of value.

McNally involved the funnelling of insurance policies by the two defendants to insurance companies controlled or nominally owned by the defendants. Based on this transaction, defendants were charged with defrauding the Commonwealth of Kentucky and its citizens of their right to have "the Commonwealth's business and its affairs conducted honestly, impartially, free from corruption, bias, dishonesty, deceit, official misconduct, and fraud" and obtaining money and other things of value by fraudulent means. *McNally* at 2878, n.4.

In reversing defendants' convictions the Supreme Court relied on the legislative intent surrounding the codification of the statute and the plain meaning of the words "to defraud". Its opinion concluded that § 1341 criminalizes only those offenses involving the deprivation of property rights by a scheme or artifice to defraud. "As the Court long ago stated, however, the words 'to defraud' commonly refer 'to wronging one in his property rights by dishonest methods or schemes,' and 'usually signify the deprivation of something of value by trick, deceit, chicane or overreaching.' " *McNally* at 2881, quoting *Hammerschmidt v. United States*, 265 U.S. 182, 188. The Court held that the value which is the subject of mail fraud encompasses money and property, but does not include the intangible expectation of the citizenry to an honest government, despite what intangible value such honesty may hold for the defrauded victims.

The Supreme Court further articulated the contours of the new "money or property" requirement in *Carpenter v. United States*, 108 S. Ct. 316, which involved R. Foster Winans' appropriation of confidential securities information prior to its publication in his Wall Street Journal column "Heard on the Street". In affirming the mail fraud conviction, the Court distinguished *McNally* by finding that the Journal had been defrauded of more than its right

to the defendant's honest and faithful service, "an interest too ethereal in itself to fall within the protection of the mail fraud statute". *Carpenter* at 320. The Court characterized the Journal's interest in the information contained in the column as a protectable property right in spite of its intangible nature. "*McNally* did not limit the scope of § 1341 to tangible as distinguished from intangible property rights." *Carpenter* at 320. In so holding, the Court rejected the defendants' argument that the Journal must demonstrate a monetary loss as a prerequisite to the defendants' mail fraud convictions. "Petitioners cannot successfully contend . . . that a scheme to defraud requires a monetary loss . . . ; it is sufficient that the Journal has been deprived of its right to exclusive use of the information." *Carpenter* at 321.

III

Defendants contend they were wrongfully convicted under the intangible rights theory subsequently rejected by the Supreme Court in *McNally*. They claim that this requires vacating the wire fraud convictions and even the bribery and interstate travel convictions on the basis that the latter were inextricably intertwined with the wire fraud charges. In order to determine whether defendants' convictions should be vacated, it is necessary to determine whether the indictment, jury instructions and evidence produced at trial required the jury to find that the defendants schemed to deprive the Pension Fund or its pensioners of a protectable property right within the scope of *McNally*. *United States v. Wellman*, 830 F.2d 1453, 1462 (7th Cir. 1987). In so doing the Court is mindful of the dangers of engaging in a revisionary history of the indictment, evidence and jury instructions formulated prior to the *McNally* decision. Although the indictment and jury instructions clearly contain language supporting the invalid intangible rights theory of mail fraud, the jury nonetheless was required by the indictment and instructions to find that the defendants schemed to defraud the Pension Fund of property rights protected by the wire

fraud statute despite defendants' lack of success. Such a finding was clearly justified by the evidence.

Paragraph 2 of Count Three of the indictment charged in part that the defendants devised a scheme and artifice:

> (a) To defraud the Teamsters Pension Fund and its pensioners of their right to the conscientious, loyal, faithful, disinterested, and unbiased services of Thomas F. O'Malley and Andrew G. Massa, in the performance of acts related to their official duties, functions, and employment; *and*
>
> (b) To obtain money and property by means of fraudulent pretenses and representations (J. App. 9).[4] (Emphasis added.)

This terminology was incorporated by reference in Counts Four through Eleven. Similarly, the jury instructions charged:

> The phrase 'scheme and artifice to defraud,' as used in the indictment or these instructions includes any plan or course of action intended to deceive others out of something to which they were lawfully entitled, *and* to obtain by false or fraudulent pretenses or representations money or property from persons so deceived (J. App. 44). (Emphasis added.)

The instructions (which consumed more than one hour) contained considerable elaboration of the then valid intangible rights aspect of wire fraud charging the jury that a scheme or artifice to defraud may include a scheme designed to deprive the Pension Fund of the "loyal, faithful, disinterested and unbiased services of the defendant O'Malley" and information necessary to the management company of the Pension Fund, as well as interference with the fiduciary duty of the Pension Fund trustees. Defendants argue that the discussion of the intangible rights

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[4] The property aspects of the wire fraud were also emphasized in paragraphs 3 and 4 of Count Three (J. App. 9-10).

theory overwhelmed the above *conjunctive* instruction given by Judge Marshall which required the jury to find both a scheme to defraud the Pension Fund as well as the deprivation of the Pension Fund of money or property, such that it is impossible to decipher on which theory the jury convicted the defendants.[5]

Although the instructions given by Judge Marshall did thoroughly discuss the intangible rights theory, the discussion was merely an elaboration of what may constitute a "scheme to defraud". Once the jury determined whether the defendants were guilty of a scheme to defraud as defined by Judge Marshall to include the deprivation of tangible and intangible rights, the jury was still required by the indictment to find that the defendants participated in a scheme to "obtain money and property by means of fraudulent pretenses and representations" (J. App. 9). And "[w]here a fraud scheme involves multiple objectives, some of which are insufficient to state an offense under *McNally*, the remaining charge or charges will be deemed sufficient to state the offense if they are 'easily separable' from the charges deemed insufficient." *United States v. Eckhardt*, 843 F.2d 989, 997 (7th Cir. 1988). The jury instructions did not allow conviction based on the intangible rights theory alone nor as an alternative to the money or property requirement. In light of *McNally* and the law of this Circuit, the intangible rights portion of the jury instructions was not prejudicial when viewed in the context of the conjunctive indictment and Judge Marshall's conjunctive definition of wire fraud. Therefore, *United States v. Price*, 857 F.2d 234, 236 (4th Cir. 1988), on which the defendants rely, is inapplicable.

The evidence presented at trial further supports the conclusion that the defendants engaged in a scheme to obtain money or property by fraudulent means. The essence

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[5] Additional portions of the charge stressing the property aspects of the charge are reproduced in Judge Marshall's memorandum opinion (Lombardo App. 3-4).

of the conduct in which defendants engaged was the attempted sale of the Wonderworld property to Senator Cannon and his neighbors for $1,400,000 in spite of the existence of higher bids for the property. Such a scheme clearly contemplated depriving the Pension Fund of the highest price for the Wonderworld property. Defendants attempt to justify their behavior by arguing that their conduct was motivated by their desire to benefit the Teamsters Union by blocking the deregulation legislation in return for the relatively small sacrifice of a reduction in price secured by the sale of the Wonderworld property to Senator Cannon. Defendants feebly reason that their conduct is indistinguishable from the scheme contained in *McNally* because defendants did not seek to obtain something of value for themselves but for the benefit of the Teamsters.

Defendants' rationalizations miss the mark. *McNally* did not posit the further requirement that the scheme to obtain money or property by fraudulent means result in a benefit to the schemers. *McNally* simply requires the devising of a scheme for the purpose of obtaining property rights by false means. Admittedly, most schemes to defraud are designed to benefit the schemers personally. This does not transform the characteristic of personal pecuniary benefit into an element of the crime nor make defendants' conduct less culpable. The mail fraud statute is primarily concerned with the protection of the rights of victims. "[T]he original impetus behind the mail fraud statue was to protect the people from schemes to deprive them of their money or property." *McNally* at 2880. The Pension Fund was no less harmed as a result of defendants' wire fraud scheme to sell the Wonderworld property to Senator Cannon for a bargain price than if the defendants had purchased the property themselves and received the benefit of the $200,000 reduction in the price. The fact that defendants were depriving the Pension Fund of property for the purposes of securing a benefit of equal or greater value (*i.e.*, the "appreciation" of Senator Cannon), does not deflect from the reality that the pensioners were being deprived of property without their knowledge by fraudulent means.

The district court's order denying defendants' motion to vacate pursuant to 28 U.S.C. § 2255 is affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

[Dated February 18, 1988]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

No. 81 CR 269 v.

ROY L. WILLIAMS and JOSEPH LOMBARDO,

Defendants.

MEMORANDUM OPINION

PRENTICE H. MARSHALL, District Judge

Defendants, Roy L. Williams and Joseph Lombardo, were convicted following a trial by jury in 1982 of conspiring to bribe a United States Senator (count 1), travel in interstate commerce to facilitate that bribery (count 2) and the use of interstate telephone calls to defraud the Teamsters Pension Fund (counts 3-11). Williams was sentenced to five years incarceration on counts 1 - 6 and a consecutive five years of incarceration on counts 7 - 11. Lombardo was sentenced to five years incarceration on each of counts 1, 2 and 3 to run consecutively for a total of 15 years, and to five years probation on counts 5 - 11, to run consecutively to the incarceration. The convictions were affirmed on appeal. *United States v. Williams*, 737 F. 2d 594 (7th Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985). Thereafter we denied Lombardo's motion to vacate his

conviction and the court of appeals affirmed. *United States v. Lombardo*, 87-1706 (7th Cir. August 26, 1987) (unpublished order).

Williams and Lombardo now ask that their convictions be vacated and the indictment against them dismissed in the wake of *United States v. McNally*, 107 S. Ct. 2875 (1987), limiting the scope of the mail fraud statute to the protection of property rights. Of course, the reach and limitations of the wire fraud statute are identical to those of the mail fraud statute.

Of course *McNally* has no impact upon counts 1 and 2, in which defendants were charged and convicted of conspiracy to bribe a United States Senator and traveling in interstate commerce to facilitate that bribery. The question is whether *McNally* requires vacation of the wire fraud convictions (counts 3-11) which clearly impact on both defendants' sentences. We hold that *McNally* does not support the vacation of defendants' wire fraud convictions.

The indictment in this case did not allege a pure intangible right theory of wire fraud. While Williams and Lombardo were charged with scheming to defraud the pension fund of its rights to Trustee O'Malley's honest and faithful services, they were also charged with scheming to defraud the pension fund of the Wonderworld property itself. *United States v. Dorfman*, 532 F. Supp. 1118, 1126 (N.D. Ill. 1981). The indictment alleged that the fraud scheme contemplated obtaining the property through the removal of competing bidders whose offers were in excess of the bids of Senator Howard Cannon and his associates. The indictment alleged two objectives of the scheme to defraud in the conjunctive. And the jury instructions required a conjunctive finding.

On two different occasions the jury was instructed that the fraud scheme consisted of both aspects. Thus the jury was told,

> Counts III through XI allege the defendants, with the intent to defraud, engaged in a scheme to defraud the Teamsters Pension Fund and its pensioners of

their right to the conscientious, loyal, faithful, disinterested and unbiased services of defendants O'Malley and Massa in the performance of acts related to their official duties and employment *and* to obtain money and property by means of fraudulent pretenses and representations.

In furtherance of that scheme, these counts allege the defendants attempted to obtain the exclusive right to purchase the Wonderworld Property for Senator Cannon and persons associated with him; caused others who submitted bids to Victor Palmieri and Company for the purchase of the Wonderworld property to withdraw their bids. Failed to disclose to Victor Palmieri and Company that defendants O'Malley and Massa caused the withdrawal of bids for the purchase of the Wonderworld property which were higher than and in competition with the bids of Senator Cannon and persons associated with him; and used the interstate wires to promote and execute the scheme.

Tr. 7953 - 7954 (emphasis added).

We went on to define "scheme and artifice to defraud" as follows:

The phrase "scheme and artifice to defraud" as used in the indictment or these instructions includes any plan or course of action intended to deceive others out of something to which they are lawfully entitled, *and* to obtain by false or fraudulent pretenses or representations money or property from persons so deceived. __

Tr. 7959 (emphasis added).

Finally, we charged the jury that,

To sustain the charges of transmitting telephone conversations in interstate commerce for the purpose of executing a scheme and artifice to defraud against each defendant, as alleged in counts III through XI

of the indictment, the Government must prove the following propositions:

> First, that the alleged scheme to defraud existed; and,
>
> Second, that the particular defendant knowingly and intentionally joined in the alleged scheme to defraud; and,
>
> Third, that the particular defendant joined the alleged scheme to defraud with the intent to defraud the Central States, Southeast and Southwest Areas Pension Fund and its pensioners; . . .

Tr. 7992 - 7993.

Of course the jury was told that the government's burden of proof was beyond a reasonable doubt.

The evidence in this case was abundant that the defendants schemed to obtain the Wonderworld property for Howard Cannon and his associates at a price lower than that bid by competitive bidders. The ultimate object of the scheme was the property itself.

Thus the indictment alleged and the jury was instructed that in order to convict on counts III through XI it was necessary for the government to prove beyond a reasonable doubt that the defendants had schemed to defraud the pension fund of tangible property. Thus, the faithful services aspect of the scheme was surplusage. Under these circumstances, *McNally* dictates no relief for defendants.

The motions of Roy L. Williams and Joseph Lombardo to vacate their convictions are denied.

ENTER:

/s/ PRENTICE H. MARSHALL
Prentice H. Marshall
District Judge

DATED: February 18, 1988.

APPENDIX C

[Letterhead Of]

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Mr. H. Stuart Cunningham,
Clerk
United States District Court
219 South Dearborn Street
Chicago, Illinois 60604

Date: February 3, 1989

Re: JOSEPH LOMBARDO and ROY L. WILLIAMS,
Petitioners-Appellants,
vs.
UNITED STATES OF AMERICA,
Respondent-Appellee.

U.S.C.A.-7 Nos. 88-1482 and 88-1522
District Court No. 81 CR 269
Judge Prentice H. Marshall

Dear Clerk:

Herewith is the mandate of this Court in the above-entitled appeal. "A certified copy of the judgment and a copy of the opinion of the Court, if any, and any direction as to costs shall constitute the mandate." (F.R.A.P. 41(a)). I am also returning the original record of your District Court, which was transmitted to this office for use on appeal. Please acknowledge receipt of the enclosed copy of this letter.

Contents of Record being Returned:

Contents of Record to be Returned Later:
11 Vols. Pleadings
125 Vols. Transcripts
1 Binder, 2 Vols. Exhibits
11 Bound Loose Pleadings
1 White Env., 21 Envs.
IN CAMERA
/s/ MABEL L. BOHER
U.S.C.A. Deputy Clerk

Received above mandate and record from the Clerk of the United States Court of Appeals for the Seventh Circuit.

Date: _____ _____
Clerk of District Court

Copies Mailed to:

Judith Halprin, 29 East Madison, Suite 503, Chicago, Illinois
Anton Valukas, Office of United States Attorney, 219 South Dearborn, Chicago
F. Russell Millin, 2621 Holmes, Kansas City, Missouri 64108
Bruce C. Houdek, 500 Scarritt Building, 818 Grand Avenue, Kansas City, MO
Office of United States Marshal, 219 South Dearborn
Office of United States Probation Officer, 219 South Dearborn

* * * * *

APPENDIX D

[Filed May 22, 1981]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA

v.

ALLEN M. DORFMAN, ROY L. WILLIAMS, JOSEPH LOMBARDO, THOMAS F. O'MALLEY, and ANDREW G. MASSA, also known as AMOS MASSA

No. 81 CR 269
Violation: Title 18
United States Code,
Sections 371, 1952
and 1343

The SPECIAL MARCH 1980 GRAND JURY charges:

1. At all times pertinent to this indictment, the Central States, Southeast and Southwest Areas Pension Fund, hereinafter referred to as the Teamsters Pension Fund, was a trust fund established to provide retirement and related benefits to certain members of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, hereinafter referred to as the Teamsters. The Teamsters Pension Fund was established by agreement between various Teamsters' regional organizations and their affiliated local unions, and employers

of the local union members, and was managed by a Board of Trustees, comprised of four (4) trustees representing employers and four (4) trustees representing employees. At all times pertinent to this indictment, it was the duty of the trustee and employees of the Teamsters Pension Fund to hold, manage, care for, and protect the Teamsters Pension Fund for the benefit of the covered employees.

2. ALLEN M. DORFMAN, defendant herein, formerly a special consultant to the Teamsters Pension Fund, whose responsibilities included the making of recommendations to the Board of Trustees, concerning the acquisition, management, and disposition of Teamsters Pension Fund investments, was at all times pertinent to this indictment, a shareholder of Amalgamated Insurance Agency Services, Inc., hereinafter referred to as Amalgamated Insurance. At all times pertinent to this indictment, Amalgamated Insurance was under contract to the Teamsters Central States, Southeast and Southwest Areas Health and Welfare Fund, hereinafter referred to as Teamsters Health and Welfare Fund, to administer and adjudicate health and welfare benefits claims filed with the Teamsters Health and Welfare Fund.

3. ROY L. WILLIAMS, defendant herein, formerly an Employee Trustee of the Teamsters Pension Fund, was, at all times pertinent to this indictment, President of the Central Conference of Teamsters, one of the Teamster's regional organizations whose affiliated local unions were covered by the Teamsters Pension Fund.

4. THOMAS F. O'MALLEY, defendant herein, was, at all times pertinent to this indictment, an Employer Trustee of the Teamsters Pension Fund.

5. ANDREW G. MASSA, defendant herein, formerly an Employer Trustee of the Teamsters Pension Fund, was, at all times pertinent to this indictment, an employee of the Teamsters Pension Fund and the Teamsters Health and Welfare Fund.

6. At all times pertinent to this indictment, Howard W. Cannon was a United States Senator from Nevada and Chairman of the Committee on Commerce, Science, and Transportation of the United States Senate.

7. At all times pertinent to this indictment, William E. Webbe was an employee of Amalgamated Insurance.

8. At all times pertinent to this indictment, Victor Palmieri and Company, Incorporated, hereinafter referred to as Palmieri Company, was an agent of the Teamsters Pension Fund for the purpose of managing the real estate of the Teamsters Pension Fund west of the Mississippi River.

9. At all times pertinent to this indictment, one of the assets of the Teamsters Pension Fund was a certain piece of property approximately 5.8 acres in size located in the Las Vegas Country Club Estates, Las Vegas, Nevada, which was known as the Wonderworld Property.

10. At all times pertinent to this indictment, the Palmieri Company was attempting to sell the Wonderworld Property on behalf of the Teamsters Pension Fund.

11. From in or about the latter part of 1978, the exact date being to the grand jury unknown, and continuing to on or about July 2, 1979, in the Northern District of Illinois, Eastern Division, and elsewhere,

ALLEN M. DORFMAN,
ROY L. WILLIAMS,
JOSEPH LOMBARDO,
THOMAS F. O'MALLEY, and
ANDREW G. MASSA,
also known as AMOS MASSA,

defendants herein, did knowingly, willfully and unlawfully combine, conspire, confederate and agree together and with each other and with diverse other persons to the grand jury known and unknown, to commit offenses against the United States, to wit:

A. To directly and indirectly, corruptly give, offer and promise a thing of value to Senator Howard W. Cannon,

a public official, with intent to influence his official acts, that is, his actions and decisions proposed legislation concerning the deregulation of the trucking industry prior to, during and after its introduction in the United States Senate; in violation of Title 18, United States Code, Section 201(b)(1).

B. To travel and willfully cause others to travel in interstate commerce with the intent to promote and carry on and facilitate the promotion and carrying on of an unlawful activity, that is, the bribery of Senator Howard W. Cannon, and that the defendants thereafter performed and attempted to perform and did cause others to perform and attempt to perform acts to promote and carry on said bribery; in violation of Title 18, United States Code, Section 1952.

12. It was part of the conspiracy that the defendants and William E. Webbe would and did attempt to obtain an exclusive right to purchase the Wonderworld Property for Senator Howard W. Cannon and individuals associated with him at a specified price.

13. It was further part of the conspiracy that defendants and William E. Webbe would and did attempt to influence employees of Palmieri Company in their decision as to the purchaser and sales price of the Wonderworld Property.

14. It was further a part of the conspiracy that the defendants and William E. Webbe would and did cause other individuals and entities not associated with Senator Howard W. Cannon to withdraw bids made to Palmieri Company for the purchase of the Wonderworld Property.

15. It was further a part of the conspiracy that the defendants and William E. Webbe would and did submit and cause to be submitted to Palmieri Company bids to purchase the Wonderworld Property for and on behalf of Senator Howard W. Cannon and others associated with him, without disclosing defendant ALLEN M. DORFMAN's participation in the proposed purchase of the Wonderworld Property.

16. It was further a part of the conspiracy that the defendants and William E. Webbe would and did engage in the efforts described in paragraphs 12 through 15 with intent to influence certain actions to be performed by Senator Howard W. Cannon, to wit: securing the referral of any proposed legislation regarding deregulation of the trucking industry to the Senate Committee on Commerce, Science, and Transportation, which was chaired by Senator Howard W. Cannon; and delaying and affecting the introduction and passage of legislation regarding deregulation of the trucking industry.

OVERT ACTS

In furtherance of the conspiracy and to effect the objects thereof, the following overt acts, among others, were committed in the Northern District of Illinois, Eastern Division, and elsewhere:

1. On or about January 10, 1979, ALLEN M. DORFMAN and ROY L. WILLIAMS met with Senator Howard W. Cannon in Las Vegas, Nevada.

2. On or about January 10, 1979, William E. Webbe met with Robert J. Bjornsen in Las Vegas, Nevada.

3. On or about January 30, 1979, Allen R. Glick had a telephone conversation with THOMAS F. O'MALLEY.

4. On or about January 30, 1979, THOMAS F. O'MALLEY and ANDREW G. MASSA met with Allen R. Glick in California.

5. On or about January 31, 1979, William E. Webbe had a telephone conversation with Robert J. Bjornsen.

6. On or about February 2, 1979, JOSEPH LOMBARDO had a telephone conversation with William E. Webbe.

7. On or about February 13, 1979, William E. Webbe met with ROY L. WILLIAMS, THOMAS F. O'MALLEY, and ANDREW G. MASSA in Chicago, Illinois.

8. On or about February 26, 1979, ALLEN M. DORFMAN met with Robert J. Bjornsen, William E. Webbe, and Robert L. Smith in Las Vegas, Nevada.

9. On or about March 9, 1979, Robert J. Bjornsen had a telephone conversation with William E. Webbe.

10. On or about April 26, 1979, ROY L. WILLIAMS had a telephone conversation with William E. Webbe.

11. The grand jury realleges and incorporates by reference the allegations contained in Counts Two through Eleven of this indictment, each of which Counts is alleged as a separate and distinct overt act.

All in violation of Title 18, United States Code, Section 371.

COUNT TWO

The SPECIAL MARCH 1980 GRAND JURY further charges:

On or about January 30, 1979, in the Northern District of Illinois, Eastern Division,

ALLEN M. DORFMAN,
ROY L. WILLIAMS,
JOSEPH LOMBARDO,
THOMAS F. O'MALLEY, and
ANDREW G. MASSA,
also known as AMOS MASSA,

defendants herein, did knowingly and willfully cause defendants THOMAS F. O'MALLEY and ANDREW G. MASSA to travel in interstate commerce between the Northern District of Illinois and California, with intent to promote and carry on and facilitate the promotion and carrying on of an unlawful activity, namely the bribery of a United States Senator, in violation of the laws of the United States, to wit: Title 18, United States Code, Section 201(b)(1), and thereafter, the defendants did perform and cause to be performed acts to promote and carry on and facilitate the promotion and carrying on of said bribery.

In violation of Title 18, United States Code, Section 1952.

COUNT THREE

The SPECIAL MARCH 1980 GRAND JURY further charges:

1. Paragraphs 1. through 10. of Count One of this indictment are realleged and incorporated by reference.

2. From in or about the latter part of November, 1978, the exact date being to the grand jury unknown, and continuing to on or about July 2, 1979, in the Northern District of Illinois, Eastern Division, and elsewhere,

ALLEN M. DORFMAN,
ROY L. WILLIAMS,
JOSEPH LOMBARDO,
THOMAS F. O'MALLEY, and
ANDREW G. MASSA,
also known as AMOS MASSA,

defendants, devised and intended to devise a scheme and artifice:

(a) To defraud the Teamsters Pension Fund and its pensioners of the right to the conscientious, loyal, faithful, disinterested, and unbiased services of THOMAS F. O'MALLEY and ANDREW G. MASSA, in the performance of acts related to their official duties, functions, and employment; and

(b) To obtain money and property by means of fraudulent pretenses and representations.

3. It was part of the scheme and artifice to defraud that defendants William E. Webbe would and did attempt to obtain an exclusive right to purchase the Wonderworld Property at a specified price for Senator Howard W. Cannon and individuals associated with him.

4. It was further part of the scheme and artifice to defraud that defendants and William E. Webbe would and did cause individuals and entities not associated with Senator Howard W. Cannon to withdraw bids made to Palmieri Company to purchase the Wonderworld Property.

5. It was further part of the scheme and artifice that defendants would and did fail to disclose to Palmieri Company, agent for the Teamsters Pension Fund, the activities of defendants THOMAS F. O'MALLEY and ANDREW G. MASSA in causing the withdrawal of bids on the Wonderworld Property, which bids were higher than and in competition with the bids of Senator Howard W. Cannon and persons associated with him.

6. It was further part of the scheme and artifice that defendants would and did conceal from Palmieri Company ALLEN M. DORFMAN's participation in the proposed purchase of the Wonderworld Property.

7. On or about January 30, 1979, in the Northern District of Illinois, Eastern Division, and elsewhere,

ALLEN M. DORFMAN,
ROY L. WILLIAMS,
JOSEPH LOMBARDO,
THOMAS F. O'MALLEY, and
ANDREW G. MASSA,
also known as AMOS MASSA,

defendants herein, for the purpose of executing the above-described scheme and artifice to defraud and to obtain money and property by means of false and fraudulent pretenses and representations, knowingly caused the transmission of and transmitted by wire in interstate commerce between the Northern District of Illinois, Eastern Division, and California, a telephone conversation among defendants ALLEN M. DORFMAN, JOSEPH LOMBARDO, and THOMAS F. O'MALLEY regarding causing Allen R. Glick to withdraw his bid to purchase the Wonderworld Property.

In violation of Title 18, United States Code, Section 1343.

COUNT FOUR

The SPECIAL MARCH 1980 GRAND JURY further charges:

1. Paragraphs 1. through 6. of Count Three of this indictment are realleged and incorporated by reference.

2. On or about February 13, 1979, in the Northern District of Illinois, Eastern Division, and elsewhere,

ALLEN M. DORFMAN,
ROY L. WILLIAMS,
JOSEPH LOMBARDO,
THOMAS F. O'MALLEY, and
ANDREW G. MASSA,
also known as AMOS MASSA,

defendants herein, for the purpose of executing the above-described scheme to defraud and to obtain money and property by means of false and fraudulent pretenses and representations, knowingly caused the transmission of and transmitted by wire in interstate commerce between the Northern District of Illinois, Eastern Division, and Hawaii, a telephone conversation between defendant ALLEN M. DORFMAN and William E. Webbe regarding the bidding to purchase the Wonderworld Property.

In violation of Title 18, United States Code, Section 1343.

COUNT FIVE

The SPECIAL MARCH 1980 GRAND JURY further charges:

1. Paragraphs 1. through 6. of Count Three of this indictment are realleged and incorporated by reference.

2. On or about February 13, 1979, in the Northern District of Illinois, Eastern Division, and elsewhere,

ALLEN M. DORFMAN,
ROY L. WILLIAMS,
JOSEPH LOMBARDO,
THOMAS F. O'MALLEY, and
ANDREW G. MASSA,
also known as AMOS MASSA,

defendants herein, for the purpose of executing the above-described scheme to defraud and to obtain money and property by means of false and fraudulent pretenses and

representations, knowingly caused the transmission of and transmitted by wire in interstate commerce between the Northern District of Illinois, Eastern Division, and California, a telephone conversation between Allen R. Glick and William E. Webbe regarding causing Fred Glusman to withdraw his bid to purchase the Wonderworld Property.

In violation of Title 18, United States Code, Section 1343.

COUNT SIX

The SPECIAL MARCH 1980 GRAND JURY further charges:

1. Paragraphs 1. through 6. of Count Three of this indictment are realleged and incorporated by reference.

2. On or about February 15, 1979, in the Northern District of Illinois, Eastern Division, and elsewhere,

ALLEN M. DORFMAN,
ROY L. WILLIAMS,
JOSEPH LOMBARDO,
THOMAS F. O'MALLEY, and
ANDREW G. MASSA,
also known as AMOS MASSA,

defendants herein, for the purpose of executing the above-described scheme to defraud and to obtain money and property by means of false and fraudulent pretenses and representations, knowingly caused the transmission of and transmitted by wire in interstate commerce between the Northern District of Illinois, Eastern Division, and California, a telephone conversation between defendant Allen R. Glick, William E. Webbe, and defendant THOMAS F. O'MALLEY regarding the withdrawal by Fred Glusman of his bid to purchase the Wonderworld Property.

In violation of Title 18, United States Code, Section 1343.

COUNT SEVEN

The SPECIAL MARCH 1980 GRAND JURY further charges:

1. Paragraphs 1. through 6. of Count Three of this indictment are realleged and incorporated by reference.

2. On or about March 12, 1979, in the Northern District of Illinois, Eastern Division, and elsewhere,

ALLEN M. DORFMAN,
ROY L. WILLIAMS,
JOSEPH LOMBARDO,
THOMAS F. O'MALLEY, and
ANDREW G. MASSA,
also known as AMOS MASSA,

defendants herein, for the purpose of executing the above-described scheme to defraud and to obtain money and property by means of false and fraudulent pretenses and representations, knowingly caused the transmission of and transmitted by wire in interstate commerce between the Northern District of Illinois, Eastern Division, and Nevada, a telephone conversation between defendant ALLEN M. DORFMAN and Robert Bjornsen concerning financing the proposed purchase of the Wonderworld Property.

In violation of Title 18, United States Code, Section 1343.

COUNT EIGHT

The SPECIAL MARCH 1980 GRAND JURY further charges:

1. Paragraphs 1. through 6. of Count Three of this indictment are realleged and incorporated by reference.

2. On or about March 13, 1979, in the Northern District of Illinois, Eastern Division, and elsewhere,

ALLEN M. DORFMAN,
ROY L. WILLIAMS,
JOSEPH LOMBARDO,
THOMAS F. O'MALLEY, and
ANDREW G. MASSA,
also known as AMOS MASSA,

defendants herein, for the purpose of executing the above-described scheme to defraud and to obtain money and property by means of false and fraudulent pretenses and representations, knowingly caused the transmission of and transmitted by wire in interstate commerce between the Northern District of Illinois, Eastern Division, and Nevada, a telephone conversation between defendant ALLEN M. DORFMAN and Robert L. Smith concerning financing the proposed purchase of the Wonderworld Property.

In violation of Title 18, United States Code, Section 1343.

COUNT NINE

The SPECIAL MARCH 1980 GRAND JURY further charges:

1. Paragraphs 1. through 6. of Count Three of this indictment are realleged and incorporated by reference.

2. On or about March 29, 1979, in the Northern District of Illinois, Eastern Division, and elsewhere,

ALLEN M. DORFMAN,
ROY L. WILLIAMS,
JOSEPH LOMBARDO,
THOMAS F. O'MALLEY, and
ANDREW G. MASSA,
also known as AMOS MASSA,

defendants herein, for the purpose of executing the above-described scheme to defraud and to obtain money and property by means of false and fraudulent pretenses and representations, knowingly caused the transmission of and

transmitted by wire in interstate commerce between the Northern District of Illinois, Eastern Division, and California, a telephone conversation among defendant ALLEN M. DORFMAN, David Dorfman, and William E. Webbe concerning terms for a proposed bid to Palmieri Company for the purchase of the Wonderworld Property.

In violation of Title 18, United States Code, Section 1343.

COUNT TEN

The SPECIAL MARCH 1980 GRAND JURY further charges:

1. Paragraphs 1. through 6. of Count Three of this indictment are realleged and incorporated by reference.

2. On or about March 29, 1979, in the Northern District of Illinois, Eastern Division, and elsewhere,

ALLEN M. DORFMAN,
ROY L. WILLIAMS,
JOSEPH LOMBARDO,
THOMAS F. O'MALLEY, and
ANDREW G. MASSA,
also known as AMOS MASSA,

defendants herein, for the purpose of executing the above-described scheme to defraud and to obtain money and property by means of false and fraudulent pretenses and representations, knowingly caused the transmission of and transmitted by wire in interstate commerce between the Northern District of Illinois, Eastern Division, and Washington, D. C. or Virginia, the exact location being to the grand jury unknown, a telephone conversation among defendant ROY L. WILLIAMS, James Walsh, and William E. Webbe concerning negotiations with Palmieri Company for the purchase of the Wonderworld Property through Robert L. Smith Company on behalf of Senator Howard W. Cannon and others.

In violation of Title 18, United States Code, Section 1343.

COUNT ELEVEN

The SPECIAL MARCH 1980 GRAND JURY further charges:

1. Paragraphs 1. through 6. of Count Three of this indictment are realleged and incorporated by reference.

2. On or about May 21, 1979, in the Northern District of Illinois, Eastern Division, and elsewhere,

ALLEN M. DORFMAN,
ROY L. WILLIAMS,
JOSEPH LOMBARDO,
THOMAS F. O'MALLEY, and
ANDREW G. MASSA,
also known as AMOS MASSA,

defendants herein, for the purpose of executing the above-described scheme to defraud and to obtain money and property by means of false and fraudulent pretenses and representations, knowingly caused the transmission of and transmitted by wire in interstate commerce between the Northern District of Illinois, Eastern Division, and Washington, D. C., a telephone conversation between defendant ALLEN M. DORFMAN and Senator Howard W. Cannon concerning the resubmitting of a bid by Robert Bjornsen to purchase the Wonderworld Property on behalf of Senator Howard W. Cannon and others.

In violation of Title 18, United States Code, Section 1343.

A TRUE BILL:

_____
FOREPERSON

_____
UNITED STATES ATTORNEY

APPENDIX E

[7959] * Charge

The term "bribery" as used in Counts I and II of the indictment means the direct or indirect corruptly offering or promising of anything of value to a public official with the intent to influence his official conduct.

It is not necessary that you find that the bribe offer alleged in the indictment was actually accepted by Senator Howard W. Cannon or that Senator Cannon took or intended to take any official action as a result of the alleged offering of the bribe. It is the agreement among the defendants to offer Senator Cannon a bribe in order to influence his official conduct which is charged, not the receipt of any bribe or the performance of any act by Senator Cannon.

The phrase "scheme and artifice to defraud", as used in the indictment or these instructions, includes any plan or course of action intended to deceive others out of something to which they are lawfully entitled, and to obtain by false or fraudulent pretenses or representations money or property from persons so deceived.

A false or fraudulent pretense or representation may be made by the concealment of material facts with the intent to defraud, as well as by affirmative statements or acts.

A material fact is a fact that would be important to a reasonable person in deciding whether to engage [7960] or not engage in a particular transaction.

The success or failure of the scheme is immaterial, and it is not necessary to show that the Central States Pension Fund, Victor Palmieri and Company or any of its participants or beneficiaries were in fact defrauded.

---

* Numbers in brackets refer to the Transcript of Proceedings.

To act with specific intent to defraud means to act with knowledge of the fraudulent nature of one's conduct and with the intention of doing the acts described in order to bring about the harm contemplated by the alleged scheme.

Bad faith is an essential element of fraudulent intent. Good faith is a complete defense to one charged with an offense of which fraudulent intent is an essential element. If the evidence in the case leaves you with a reasonable doubt whether a defendant acted in bad faith, or if you find he believed in good faith that he was not misleading or defrauding anyone, they you should find that defendant not guilty of the charges made against him in Counts III through XI of the indictment.

A scheme to deprive the Central States Pension Fund and/or its pensioners of the conscientious, loyal, faithful, disinterested and unbiased services of the defendant O'Malley comes within the meaning of the term "scheme and artifice to defraud" as the term is used in the indictment and these instructions.

[7961] Similarly, a scheme to deprive the Central States Pension Fund and its agent Victor Palmieri Company of information material to a decision which Victor Palmieri Company was required to make as a fiduciary and exclusive management agent of the Pension Fund also comes within the meaning of a "scheme or artifice to defraud."

However, a defendant must have knowingly interfered with an employer-employee relationship or caused the breach of a fiduciary relationship for the purpose and with the intent of depriving the Central States Pension Fund and its participants of the honest and faithful performance of the duties which defendant O'Malley owed the Central States Pension Fund.

[7962] Therefore, it is for you to decide whether the Government has proved beyond a reasonable doubt that Mr. O'Malley failed to disclose any facts to the Pension Fund and Victor Palmieri Company, and, if so, whether the

facts were material. And if you find that he did fail to disclose material facts, whether the other defendants knew and intended that he would fail to disclose those facts.

The Defendant O'Malley as a trustee of the Central States Pension Fund had a duty to disclose and not to conceal facts known to him which he had reason to believe were material to the decisions of the Central States Pension Fund and his agent Victor Palmieri concerning the management and sale of real estate assets of the Central States Pension Fund.

The fact that Defendant O'Malley did not have responsibility for the management and sale of Central States Pension Fund real estate assets does not change his duty of disclosure.

In determining whether the defendants defrauded the Central States Pension Fund and those covered by its benefits of their right to the conscientious, loyal, faithful, disinterested and unbiased services of Defendant O'Malley, you may consider the following statements of law which service to define the standards of conduct expected of employees generally and of a pension fund trustee [7963] particularly:

> "(1) An employee owes his employer a duty of loyalty, which includes a duty not to conceal facts known to him which he has reason to believe are material to the employers' conduct of its business and affairs.
>
> (2) By law, a trustee of a pension fund owes an even higher duty to those whose property has been entrusted to his care. A trustee is a fiduciary, and, as such, he must discharge his duties with respect to the Pension Fund solely in the interest of the participants and beneficiaries of the pension fund, for the exclusive purpose of providing benefits to them. A trustee owes the beneficiaries of the pension fund a duty to complete and undivided loyalty.

(3) A trustee of a pension fund may not act in any capacity in any transaction involving the pension fund on behalf of a party whose interests are adverse to the interests of the pension fund or other interests of its participants or beneficiaries."

In determining whether the alleged scheme to defraud existed, you may consider the actions and [7964] statements of all the alleged participants. The scheme to defraud may be inferred from all the circumstances and the conduct of all of the alleged participants.

In determining whether a particular defendant became a member of the alleged scheme to defraud, you may consider only the acts and statements of that particular defendant.

To be a member of the alleged scheme to defraud, a particular defendant need not join at the beginning or know all the other members or means by which the purpose of the scheme was to be accomplished. However, the Government must prove beyond a reasonable doubt from the particular defendants' own acts and statements that he was aware of the purpose of the scheme and was a knowing and willing participant in the scheme.

The transmission of an interstate telephone call in furtherance of the scheme to defraud is an essential element of each of Counts III through XI. It is not necessary that the making of the telephone call specified in each count of the indictment was contemplated by the scheme or that a defendant participated in a particular call or intended that interstate calls be made.

It is sufficient to establish this element of the crime if interstate telephone calls were in fact made

* * * * *

[7982] You have also heard evidence that under the management contract with Victor Palmieri and Company, the trustees of the Pension Fund retained the responsibility of monitoring Victor Palmieri and Company's compliance

with its fiduciary obligation to the Pension Fund under the management contract and the applicable law.

You have heard evidence that during the period covered by the indictment, Mr. O'Malley engaged in certain conversations and conduct. You must determine from your consideration of all the evidence whether Mr. O'Malley engaged in those conversations and that conduct, and whether those conversations and that conduct breached Mr. O'Malley's fiduciary duty to the Pension Fund, or whether instead the conversations and conduct constituted acts within his responsibility of monitoring Victor Palmieri and Company's compliance with its fiduciary obligations under the management contract and the applicable and, thus, fell within Mr. O'Malley's fiduciary obligations.

If from your consideration of all the evidence you have a reasonable doubt that Mr. O'Malley engaged in those conversations and that conduct, or that those conversations and that conduct breached Mr. O'Malley's fiduciary duty to the Pension Fund, then you must acquit all of the defendants of defrauding the Pension Fund and its pensioners of their right to the conscientious, loyal, [7983] faithful, disinterested and unbiased services of Mr. O'Malley as charged in Counts III through XI of the indictment.

[7984] In determining whether certain conduct breached Mr. O'Malley's fiduciary duty to the Pension Fund, you must consider it against the standards defining his fiduciary duties, which I have given you with these instructions, and all the evidence in the case.

On the other hand, to sustain the charges alleged in Counts III through XI, you must find more than that Mr. O'Malley by engaging in certain conversations and conduct breached his fiduciary duty to the Pension Fund.

In addition, you must find beyond a reasonable doubt that Mr. O'Malley had an affirmative duty to disclose to the Pension Fund his conversations, and conduct, and that he either did not disclose the information to the Pension Fund or made misrepresentations regarding his conversations and conduct.

If from your consideration of all the evidence you have a reasonable doubt that Mr. O'Malley either had an affirmative duty to disclose to the Pension Fund his conversations and conduct, or, if he did have a duty of disclosure, that he failed to disclose them or he misrepresented the nature of his conversations and conduct, then you must acquit all of the defendants of defrauding the Pension Fund and the pensioners of their right to the conscientious, loyal, faithful, disinterested and unbiased services of Mr. O'Malley as charged in Counts III through XI of the indictment.

[7985] In determining whether Mr. O'Malley had a duty to disclose information about his conduct to the Pension Fund, you must consider all of the evidence, including evidence regarding Mr. O'Malley had reason to believe the information about his conduct would lead the Pension Fund to amend the conduct.

In this regard, you should consider evidence about the nature of Mr. O'Malley fiduciary relationship with the Pension Fund, the rules of conduct applicable to Mr. O'Malley's position at the Pension Fund, and any instructions, if any, given to Mr. O'Malley concerning his duties at the Pension Fund.

By his plea of not guilty, the defendant O'Malley has denied he was part of any conspiracy to bribe Senator Cannon as charged in Count I; that he traveled in interstate commerce to promote the alleged bribery, as charged in Count II; or that he was party to any scheme to defraud the Teamsters Pension Fund, as charged in Counts III through XI.

Mr. O'Malley contends that he had no knowledge of any attempt to offer Senator Cannon a bribe on January 10, 1979, if in fact that happened, and therefore he did not travel to California to see Mr. Glick on January 30, 1979, to promote such a bribe offer.

(2)

Supreme Court, U.S.
FILED
MAY 26 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1616

In the Supreme Court of the United States

OCTOBER TERM, 1988

JOSEPH LOMBARDO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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12 pp

QUESTION PRESENTED

Whether petitioner's convictions should be vacated on collateral attack in light of *McNally* v. *United States*, 483 U.S. 350 (1987).

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A10) is reported at 865 F.2d 155. The opinion of the district court (Pet. App. B1-B4) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 1989. The petition for a writ of certiorari in this civil case was filed on April 3, 1989, and is therefore timely. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 1982, petitioner, along with four co-defendants, was convicted on one count of conspiracy to bribe a United States Senator, in violation of 18 U.S.C. 371; one count of interstate travel with the intent to promote bribery, in vio-

lation of 18 U.S.C. 1952; and nine counts of wire fraud, in violation of 18 U.S.C. 1343. Petitioner's conviction was upheld on direct appeal. *United States* v. *Williams*, 737 F.2d 594 (7th Cir. 1984), cert. denied, 470 U.S. 1003 (1985). In 1987, this Court decided *McNally* v. *United States*, 483 U.S. 350, in which it held that the mail fraud statute did not prohibit schemes to defraud citizens of their "intangible right" to honest government services. Pursuant to 28 U.S.C. 2255, petitioner subsequently moved to vacate his convictions in the United States District Court for the Northern District of Illinois. The district court denied the motion. Pet. App. B1-B4. The court of appeals affirmed. *Id.* at A1-A10.

1. Petitioner's convictions arose out of his participation with four co-defendants in a scheme to sell a piece of property located in Las Vegas, Nevada, to then United States Senator Howard Cannon. His co-defendants were Roy L. Williams, the president of the Central Conference of Teamsters; Allen Dorfman, a former special consultant to the Teamsters Central States Pension Fund (the Pension Fund); Thomas F. O'Malley, a trustee of the Pension Fund; and Andrew G. Massa, a former trustee of the Pension Fund.

The Las Vegas property, which was located across the street from Senator Cannon's residence, was owned by the Pension Fund. In late 1978, Senator Cannon and a group of neighbors expressed interest in purchasing the property in order to prevent it from being commercially developed. At that time, legislation designed to deregulate the trucking industry was pending in Congress. The Teamsters strongly opposed that legislation and Senator Cannon, who was the Chairman of the Senate Committee on Commerce, was in a position to affect its future. Seeking to influence Senator Cannon's actions on the legislation, Williams and Dorfman promised to take steps to enable the Senator's group

to purchase the Las Vegas property from the Pension Fund for $1,400,000, to the exclusion of any higher bids. Pet. App. A3.

Williams and Dorfman did not have direct control over the sale of the Las Vegas property, which was known as Wonderworld, because the Pension Fund had agreed in 1977 to turn over control of its assets to Victor Palmieri and Company, a management company, in order to retain its tax-exempt status. Accordingly, in an effort to fulfill their promise to Senator Cannon, the defendants attempted to control the sale of the property by persuading others to withdraw their higher bids. In particular, petitioner proposed to Dorfman that they send O'Malley and Massa to talk to Allen Glick, who had submitted a bid of $1,600,000 for the Wonderworld property. After Williams approved petitioner's proposal, O'Malley and Massa met with Glick and persuaded him to withdraw his bid. Shortly afterwards, Glick persuaded a business partner, Fred Glusman, to withdraw his independent bid of $1,600,000 for the property. Nonetheless, despite the efforts of petitioner and his co-defendants, the Wonderworld property was eventually sold to an unrelated corporation for $1,600,000. Pet. A3-A4.

2. In *McNally*, this Court held that mail fraud convictions could not be based on the theory that public officials' conduct had deprived the citizens of their intangible right to honest and impartial government, which the Court concluded was not a property interest protected by the statute. Thereafter, petitioner moved to vacate his convictions on the ground that his wire fraud convictions had been based solely on a scheme to deprive the Pension Fund of the intangible right to the honest service of its trustees.

The district court denied relief. Pet. App. B1-B4. It observed that "[t]he indictment in this case did not allege a pure intangible right theory of wire fraud" because the defendants "were [also] charged with scheming to defraud the

pension fund of the Wonderworld property itself" (*id.* at B2). The court emphasized that "[t]he indictment alleged two objectives of the scheme to defraud in the conjunctive[] [a]nd the jury instructions required a conjunctive finding" (*ibid.*). The court also pointed out that "[t]he ultimate object of the scheme was the property itself" (*id.* at B4). The court accordingly ruled that "*McNally* dictates no relief" for petitioner because "the indictment alleged and the jury was instructed that in order to convict on [the wire fraud counts] it was necessary for the government to prove beyond a reasonable doubt that the defendants had schemed to defraud the pension fund of tangible property" (*ibid.*).

3. The court of appeals affirmed. Pet. App. A1-A10. The court observed that "[a]lthough the indictment and jury instructions clearly contain language supporting the invalid intangible rights theory of mail [*sic*] fraud, the jury nonetheless was required by the indictment and instructions to find that the defendants schemed to defraud the Pension Fund of property rights protected by the wire fraud statute" (*id.* at A6-A7). The court concluded that "[i]n light of *McNally* and the law of this Circuit, the intangible rights portion of the jury instructions was not prejudicial when viewed in the context of the conjunctive indictment and [the district judge's] conjunctive definition of wire fraud" (*id.* at A8).

The court of appeals rejected petitioner's contention that the scheme was not within the reach of the wire fraud statute because its participants did not seek to obtain something of value for themselves personally, but rather for the benefit of the Teamsters. The court pointed out that "[t]he Pension Fund was no less harmed as a result of defendants' wire fraud scheme to sell the Wonderworld property to Senator Cannon for a bargain price than if the defendants had purchased the property themselves and re-

ceived the benefit of the $200,000 reduction in the price" (Pet. App. A9). The court concluded that "[t]he fact that defendants were depriving the Pension Fund of property for the purposes of securing a benefit of equal or greater value (*i.e.*, the 'appreciation' of Senator Cannon), does not deflect from the reality that the pensioners were being deprived of property without their knowledge by fraudulent means" (*ibid.*).

ARGUMENT

Petitioner's principal contention (Pet. 10-19) is that his wire fraud convictions must be vacated in light of *McNally* because the indictment and the jury instructions charged only a scheme to deprive the beneficiaries of the Pension Fund of their intangible right to the honest services of its trustees.[1] The court of appeals properly rejected petitioner's contention.

In the first place, petitioner's contention completely ignores the fact that the standard of review on collateral attack under 28 U.S.C. 2255 is more stringent than the standard that applies when a defendant challenges his conviction on direct appeal. To prevail on collateral attack, petitioner must demonstrate "actual prejudice" resulting from the error of which he complains. *United States* v. *Frady*, 456 U.S. 152, 168 (1982). Moreover, this Court made clear in *Davis* v. *United States*, 417 U.S. 333, 346 (1974), that a change in the substantive law such as the

---

[1] Petitioner also contends (Pet. 19) that his conspiracy and Travel Act convictions must likewise be vacated because they were closely related to his wire fraud convictions. That contention is frivolous. As the district court stated, "[o]f course *McNally* has no impact upon counts 1 and 2, in which defendants were charged and convicted of conspiracy to bribe a United States Senator and traveling in interstate commerce to facilitate that bribery" (Pet. App. B2).

change made by *McNally* warrants collateral relief only if, under the change in the law, petitioner's conviction could be said to be a "miscarriage of justice." Consequently, petitioner was entitled to collateral relief from his wire fraud convictions only if he showed "that under no possible view of his conduct was he guilty of a federal crime * * *." *United States* v. *Angelos*, 763 F.2d 859, 861 (7th Cir. 1985). That he has not shown. Indeed, petitioner merely alleges error in the indictment and the jury instructions, not that the evidence presented at his trial would not support a wire fraud conviction under proper instructions.

In any event, petitioner's contention that the indictment and the jury instructions charged only a scheme to deprive the Pension Fund beneficiaries of their intangible right to the honest services of its trustees is simply wrong. The indictment and the jury instructions in this case conjunctively charged a single scheme to defraud that had the dual effect of depriving the Pension Fund of both the honest services of its trustees and money or property. As the court of appeals explained, "[t]he jury instructions did not allow conviction based on the intangible rights theory alone nor as an alternative to the money or property requirement" (Pet. App. A8). Moreover, as the court of appeals pointed out, the evidence at trial showed that "[t]he essence of the conduct in which defendants engaged was the attempted sale of the Wonderworld property to Senator Cannon and his neighbors for $1,400,000 in spite of the existence of higher bids for the property" (*id.* at A8-A9). While that scheme deprived the Pension Fund of the loyal services of its trustees, it also "clearly contemplated depriving the Pension Fund of the highest price for the Wonderworld property" (*id.* at A9). Based on the indictment, the evidence, and the jury instructions, the jury therefore necessarily had to find that the scheme to defraud was intended to deprive the Pension Fund of money or property

in order to find that the Pension Fund was deprived of the honest services of its trustees.

For that reason, petitioner's reliance on *Stromberg* v. *California*, 283 U.S. 359 (1931), to support his collateral attack on his convictions is misplaced. *Stromberg* stands for the principle that a conviction based on a general verdict must be reversed if the jury was allowed to find the defendant guilty of the offense based on alternative theories and one of the theories is determined to be invalid.[2] Unlike the situation in *Stromberg*, however, petitioner's wire fraud convictions were not based on alternative theories, because the jury was required to find that the scheme to defraud was intended to deprive the Pension Fund of *both* the honest services of its trustees and money or property. Since the jury was required to find that the scheme to defraud was intended to deprive the Pension Fund of money or property in addition to depriving it of the honest services of its trustes, *Stromberg* is inapposite.[3]

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[2] In *Stromberg*, the defendant was charged with displaying a red flag in violation of a state law prohibiting such a display for any of three different purposes, one of which was not a valid ground for a conviction. This Court reversed, concluding that since "there were three purposes set forth in the statute, and the jury were instructed that their verdict might be given with respect to any one of them, independently considered, it is impossible to say under which clause of the statute the conviction was obtained" (283 U.S. at 368). In reaching that conclusion, the Court stressed that "in the instructions to the jury, the trial court * * * treated the described purposes disjunctively, holding that the appellant should be convicted if the flag was displayed for any one of the three purposes named," as an "or" connected each purpose (*id.* at 363).

[3] There is likewise no merit in petitioner's claims (Pet. 7-9) that the decision of the court of appeals conflicts with *United States* v. *Price*, 857 F.2d 234 (4th Cir. 1988), and *United States* v. *Zauber*, 857 F.2d 137 (3d Cir. 1988). In *Price*, the union officials were charged only with a scheme to defraud the union of their honest and faithful services,

At bottom, petitioner simply disagrees with the conclusion of both courts below that the indictment and the jury instructions charged that the scheme to defraud was intended to deprive the Pension Fund not only of the honest services of its trustees, but also of money or property. Petitioner's assertion (Pet. 12-17) that both courts misconstrued the indictment, the evidence, and the jury instructions is wholly fact-bound and does not warrant further review.[4]

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and the court expressly noted that "[h]ad the government charged these defendants with defrauding the union of money, * * * a different result might have been obtained here" (857 F.2d at 236 n.1). Similarly, in *Zauber* the court observed that "it is clear that the mail and wire fraud charges were based, and the jury solely instructed on, an intangible rights theory" (857 F.2d at 144). In addition, *Price* and *Zauber* were decided on direct appeal, and petitioner bears a heavier burden in this collateral attack.

[4] Petitioner also complains (Pet. 4-10) that the decision of the court of appeals denying him collateral relief here is inconsistent with its earlier decision affirming his convictions on direct appeal. That contention is based on a mischaracterization (Pet. 6) of the court's earlier opinion. To be sure, the court in that opinion stated that the indictment "charge[d] only one offense per count—one scheme to defraud the Pension Fund of the loyal services of O'Malley" (737 F.2d at 614). That statement was made in the context of rejecting petitioner's challenge to one jury instruction on the ground that it allowed the jury to reach a non-unanimous verdict (*id.* at 613). Contrary to petitioner's suggestion, however, his unanimity challenge to the jury instruction was not based on any claim that some jurors could find a scheme to defraud the Pension Fund of the honest services of its trustees while other jurors could find a scheme to defraud the Pension Fund of money or property (*id.* at 613-614). In any event, the court made plain its view of the case at the outset of its earlier opinion by observing that "the government's theory of criminal culpability is strikingly clear: the defendants * * * devised and pursued a scheme to bribe a United States Senator at the expense of the Teamsters' Central States Pension Fund" (*id.* at 598).

Finally, Congress recently amended the federal fraud statutes to provide that a " 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4508. The legislative history of the new provision explains that "[t]his section overturns the decision in *McNally* v. *United States* * * *. The intent is to reinstate all of the pre-*McNally* caselaw pertaining to the mail and wire fraud statutes without change." 134 Cong. Rec. S17,376 (daily ed. Nov. 10, 1988). The scheme in which petitioner was involved in this case would clearly fall within the scope of that new provision. Accordingly, petitioner's contention that his convictions in this case are inconsistent with *McNally* is not a claim that has any prospective importance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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